Supreme Court, U.S.
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No. 94-1791

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1994

RICHARD FREDERICKS,

Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 1995

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STATEMENT OF THE CASE

Petitioner's statement of facts omits an undisputed fact that was dispositive in the District Court and the Court of Appeals' decisions, *i.e.*, the fact that Fredericks asked his friend, Thompson, to open the door. The opinion of the Court of Appeals sets out the relevant facts as follows:

> On the evening of March 21, 1992, Burke and Wright, both in uniform, went to Fredericks's house. Burke knocked on the door. Two different versions of what happened next were offered.
>
> According to Fredericks, he heard a knock on the door and asked his friend, Steve Thompson, to "see who's there." Thompson answered the door. Fredericks then walked to the door and identified himself and was placed under arrest and asked to step outside the house. Neither Fredericks and *(sic)* Thompson recollect that the officers actually entered the house, but they are not certain.
>
> According to Burke, when Thompson answered the door,

> Burke asked if they could come in. Thompson said they could. Burke did not know Thompson and asked for Fredericks. Before Thompson could respond, Fredericks appeared, and Burke placed him under arrest.

(Pet. at A-3)

REASONS FOR DENYING THE WRIT

Petitioner argues that certiorari should be granted to resolve an issue concerning the conduct of police officers who relied upon "apparent authority" of a person to consent to entry into a home. (Pet. at 4) That issue is not properly before the court in this case. The District Court and the Court of Appeals held that Thompson was acting as Fredericks' agent when he consented to the officers' entry into the foyer of the house. Thompson had actual authority to act on behalf of Fredericks. Thus, the officers were entitled to qualified immunity on that ground.

The District Court's specific finding on the agency issue was as follows:

> Based on the deposition testimony of Fredericks that he asked Thompson to see who was at the door, the court finds that Thompson was acting as an agent of Fredericks when he answered the knock at the front door of the house and allowed the police officers to enter.

(Supp. App. at B-10)

The Court of Appeals affirmed that finding as follows:

> Here, Fredericks asked Thompson to see who was at the door. In response, Thompson opened the door and consented to the officers' entry into the foyer of the house. Given these circumstances, the district court properly found that Thompson was acting as the agent for Fredericks to the extent he allowed the officers into the foyer of the house. (Citations omitted.)

(Pet. at A-7)

This holding was made by the Court of Appeals before it addressed any issue

concerning the reasonableness of the officers' belief that Thompson had authority to consent. The holding that Thompson was Fredericks' agent resolved petitioner's claim that his constitutional rights were violated. The Court of Appeals' further conclusion that the officers had a reasonable belief that Thompson had authority to consent was unnecessary to the resolution of this case and was *dicta*.

Petitioner does not challenge the finding of agency in his petition for certiorari. Any resolution by this court of any issue concerning the officers' actions in response to Thompson's "apparent authority" would have no effect upon this case, because petitioner's constitutional rights were not violated where his agent consented to the officers' entry into petitioner's home.

Petitioner argues that the Court of Appeals' resolution of the "apparent authority" issue is in conflict with decisions of the Second and Sixth Circuit Courts of Appeals. (Pet. at 4) That contention lacks merit for two reasons.

First, the Court of Appeals applied the proper standard in resolving that issue. That is, that the officers could have reasonably believed that their entrance into the foyer of the house was permissible. (Pet. at A-8) Thus, they were entitled to qualified immunity on that ground.

Second, the Court of Appeals issued only an unpublished memorandum opinion. It could not create a conflict with other circuits, because the opinion cannot be cited as authority under the rules of the Ninth Circuit (9th Cir. R. 36-3).

CONCLUSION

The Circuit Court correctly affirmed the holding of the District Court that respondents were entitled to qualified immunity because petitioner's agent lawfully consented to any entry by the police into petitioner's home. Petitioner's only argument in his writ for certiorari concerns alleged improper conduct by the police in a situation involving a person's "apparent authority" to consent. Petitioner's constitutional rights could not have been violated in this case because consent to enter was given through his

agent. Certiorari should be denied in this case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, JANET M. SCHROER, attorney for Respondents herein, filed the above RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT with the Clerk of the Supreme Court of the United States on the _____ day of May, 1995, that it was placed in an envelope properly addressed with prepaid postage thereon and

deposited in the United States Post Office at Portland, Oregon.

I hereby certify that on this _____ day of May, 1995, three copies of the RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above-entitled case were mailed, first class postage prepaid, to James Patrick McHugh, Jr., 421 High Street, Oregon City, OR 97045, counsel for petitioner herein. I further certify that all parties required to be served have been served.

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